STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 2003B015

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

FRED NEAL,

Complainant,

VS.

DEPARTMENT OF TRANSPORTATION,

Respondent.

THIS MATTER came on for hearing on May 19 and 25, 2004, in the offices of the State Personnel Board before Administrative Law Judge Mary S. McClatchey. Complainant appeared through counsel, Mark Schwane. Respondent appeared through Valerie Arnold and Danielle Moore, Assistant Attorneys General. The record remained open until June 14, 2004 for submission of written closing arguments.

MATTER APPEALED

Fred Neal ("Complainant" or "Neal") appeals his disciplinary termination of employment by Respondent, Colorado Department of Transportation ("CDOT" or "Respondent"). Complainant seeks reinstatement, back pay, and an award of attorney fees and costs.

For the reasons set forth below, Respondent's action is affirmed.

ISSUES

- 1. Whether Complainant committed the acts for which he was disciplined;
- 2. Whether Respondent's disciplinary action against Complainant was arbitrary, capricious or contrary to rule or law;
- 3. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

- 1. Complainant commenced employment as a Materials Handler I for CDOT in the Greeley, Colorado, warehouse in 1996.
 - 2. Complainant's evaluations have historically been good. On his annual evaluation for the

period of 1997/98, he received an overall rating of "Good." For the period 1998/99, he received a "Commendable" rating.

3. In May 1998, Neal transferred to Alamosa, Colorado, to take a promotion to Materials Handler III.

Neal's Storeroom Manager Position

- 4. In his new position in Alamosa, Neal managed the storeroom for CDOT. The storeroom is nearly the size of a football field. Its inventory includes automotive parts, safety gear, gloves, hard hats, emergency roadside equipment, paint for roads and highways, blades for plows, signage, etc.
- 5. Neal was responsible for stocking, maintaining, and distributing tools and supplies for CDOT workers statewide.
- 6. Customer service was an essential component of Neal's job. He needed to maintain strong relationships with local vendors to assure continued stocking of necessary goods. In addition, he needed to order and supply the items requested by CDOT employees quickly, so that those workers could return to the field as soon as possible.
- 7. Frank Holman has been the Maintenance Superintendent in the Alamosa office since 1998. He supervises all Maintenance operations in the Alamosa region, with authority over 114 employees.
- 8. Holman was on the hiring panel that appointed Neal in Greeley in 1995; they had worked together in Greeley for approximately three years prior to their respective transfers to Alamosa. Holman and Neal got along well in Greeley.
- 9. In 1999, Neal began to have interpersonal issues on the job with others. Holman received numerous complaints from other staff and field supervisors about conflicts with Neal. While Holman gave Neal an overall annual review rating of "Fully Competent" for the period 1999/2000, he rated Neal at Needs Improvement in "People Skills." Neal was unable to demonstrate the tact and diplomacy necessary to maintain smooth working relationships with others.
- 10. Neal sometimes deleted items from the storeroom inventory without obtaining Holman's permission first, in violation of Holman's directive. This practice angered Holman, as it was evidence Neal had difficulty accepting supervisory direction. It also angered CDOT field supervisors who still wanted to have those particular items in stock.
- 11. Holman also had ongoing problems with Neal failing to arrive at work on time to open the storeroom at 8:00 a.m. When Holman spoke to Neal about it, he responded, "I've always had a problem with this, I'll try." Neal had periods of improvement, and periods of ongoing lateness, throughout his employment in Alamosa.
 - 12. Holman found that managing Neal was taking up too much of his time. In 1999, he hired a

Junior Foreman, Mike Watson, to oversee the storeroom and function as Neal's first line supervisor.

- 13. Watson came to Holman more often than he would have liked regarding his management of Neal.
- 14. In the year 2000, Watson transferred out of his position as Neal's supervisor to a field supervisor position.
 - 15. Dale Davis then took over as Neal's supervisor.

April 2001 Needs Improvement Evaluation and Corrective Action

- 16. In April 2001, Davis gave Neal an overall Needs Improvement rating on his annual performance evaluation. Davis made the following comments on the form, "is frequently late for work; does not manage time well; does not communicate with fellow employees; does not communicate with Supervisor before deleting or adding items to storeroom; communicates to other area employees about how bad his job in Alamosa is; has a problem taking orders (gets very upset when someone questions or disagrees with him); spend[s] to[o] much time on telephone (chit/chat)."
- 17. On April 20, 2001, Holman imposed a Corrective Action on Neal in connection with the Needs Improvement evaluation. He stated that Neal had to perform according to the individual performance objectives as stated in a performance management improvement plan, which was attached, and that a progress review would be conducted within 30 days. He indicated that failure to improve his performance may lead to further corrective and/or disciplinary action.

Ken Martinez

- 18. Neal supervised Ken Martinez in the storeroom. Martinez is an intelligent, articulate individual who had been offered Neal's position running the storeroom prior to the time it was offered to Neal. Martinez had turned it down because he felt he did not yet possess the requisite subject matter expertise. By the time of hearing in this matter, Martinez had already promoted out of the storeroom to a field position with CDOT.
- 19. Martinez was able to take direction easily, and was a management favorite. Neal's difficulty with taking direction from supervisors made him less popular than Martinez.
- 20. Holman determined that he would give signature authority over storeroom ordering to Martinez, instead of Neal. Neal's history of disregarding Holman's directives on adding and deleting items from the storeroom inventory caused Holman not to trust him with this authority.
- 21. Neal resented Martinez's signature authority. He felt that CDOT managers favored Martinez over him.
 - 22. Neal and Martinez did not get along; the work environment in the storeroom was very

strained. Martinez clearly disliked and disrespected Neal, once referring to him as "the sorriest" person he had ever known, to his face. Martinez harped on Neal for being a "whiner," referred to Neal's fanny pack as a purse, and referred to another CDOT worker as Neal's "butt buddy."

- 23. Neal was traumatized by Martinez's comments. He stopped talking to Martinez, often using email to convey messages about work related matters.
- 24. Neal failed to appropriately supervise Martinez. By the same token, Martinez was insubordinate to Neal. Neal never took appropriate action against Martinez, largely because he knew that his managers favored Martinez over him.
 - 25. Davis and Holman sometimes joked about going to the storeroom to "stir up" Neal.
- 26. Over time, Neal became "odd man out" at work. His alienation grew. His behavior at work became increasingly hostile and inappropriate.
 - 27. Martinez started a journal at work to record Neal's bizarre and inappropriate behavior.
- 28. Martinez witnessed Neal mumbling, shaking his head, and making animated gestures to himself. He also routinely saw Neal lose his temper while having difficulty with the computer, hitting the computer with a closed fist and cussing at it.
- 29. On April 27, 2001, Neal had a misunderstanding with Davis and Martinez regarding days off. At one point in the discussion, Neal turned red in the face, yelled, "the hell with it," and "forget it," and stormed off. Davis drew Neal back into the conversation to resolve it.
- 30. On May 1, 2001, Martinez wore body armor to work due to his uneasy feeling about Neal's potential for acting out.
- 31. On May 3, Martinez and others at work learned that over the weekend Neal had been involved in an alleged physical assault on a 14-year-old boy. Martinez and others believed this was an indicator of Neal's potential to be violent.
- 32. Neal was aware of his co-workers' knowledge of this pending legal matter. He felt extremely self-conscious and exposed at work.

May 17, 2001 Argument

- 33. On May 17, 2001, Neal had a verbal altercation with Martinez and his previous supervisor, Mike Watson, who was now a field supervisor.
- 34. Watson, who was now a client of the storeroom, arrived at the storeroom to pick up supplies. He asked Neal when a special type of new protective gloves would arrive. Neal replied that they were not getting them. He explained that the superintendents had addressed the issue and made a

final decision not to order the gloves.

- 35. Watson asked Neal why he had not been informed of this decision previously. Neal responded that he had sent an email containing this information to all supervisory staff. Watson had not received the email because he had no computer in his job as a field supervisor. Martinez then said to Neal, "No one reads your emails," in a joking yet taunting manner.
- 36. Neal then completely lost control of himself. He launched into a verbal tirade, yelling, "Fuck everyone if they don't want to listen to me, then fuck all of them. . . ." This continued for approximately a minute.
- 37. Martinez then asked Neal if he was having a bad hair day. Neal gave Martinez a hostile look and said, "Yes, and it will get worse."
- 38. Martinez felt threatened by this outburst of anger and hostility. Watson felt it was certainly inappropriate behavior in the workplace. Both men filled out CDOT "Threat/Violence Incident Report" forms. Watson stated, "Anyone who acts like that should be written up or get some help. This should not go on anymore." Martinez wrote, "I feel the manner in which Fred Neal said 'yes, and it will get worse' was a veiled or implied threat. Fred was totally out of line and his behavior was quite frightening. The tantrum he threw does not belong in a work place as it was clearly meant to intimidate and convey hostility." Martinez noted on the form that he contacted Dale Davis at home that evening, and spoke to Holman about it the next day.
- 39. Neal wrote an email to Davis and Holman about the incident. He indicated that after Watson had inquired about the gloves, he had gone to his office to get a copy of the emails he had forwarded to all foremen, and showed Watson his name on the email. After Martinez had stated, "Well nobody reads your emails," Neal writes, "I said 'well ****'em' and turned around and walked back to my office saying 'if I put out the information and no one reads it its' not my fault just ****'em.' I sat down in my chair at the computer and Mike said something to me about throwing a tantrum which I didn't respond to."

May 2001 Corrective Action Regarding Workplace Violence

- 40. Holman reviewed Watson and Martinez's workplace violence incident report forms, and Neal's email. He met with Neal on May 21 to discuss the incident.
- 41. He then spoke with Alice Baker, Human Resources Director for CDOT in Alamosa, and Richard Reynolds, Region Transportation Director, the appointing authority to whom he reported.
- 42. On May 24, 2001, Holman issued Neal a Corrective Action letter, which states in part, "I met with you on May 21, 2001 to discuss this incident. During the meeting you verified that you did, in fact, become agitated with two co-workers, raised your voice and cursed. You also indicated that you've been upset for some time and things are not going well for you."

- 43. Holman concluded that Neal had violated CDOT's Policy Directive 10.0, "Workplace Violence." The letter reflects Holman's compassion for Neal, his serious concern about Neal's declining emotional health, and his fear that Neal's hostile behavior at work would escalate. He states, "Effective immediately, you will adhere to this policy at all times As I told you when we met, you need to seek appropriate ways to deal with issues that stress you. I am truly concerned for your welfare and am hopeful the anger management classes will provide you with tools to deal with stress and anger. If Alice or I can be of assistance during this process, please call either of us. You can contact Alice at [phone number]."
 - 44. Holman required Neal to attend anger management classes.

Article Regarding Employee Suicide

- 45. Neal kept an article on his office wall concerning a company employee that had committed suicide at work.
- 46. On May 24, 2001, Neal gave Dale Davis a copy of the article. Davis, obviously concerned, informed Holman about it.
- 47. Holman asked Neal why he had shown the article to Davis. Neal was vague. Holman was uncomfortable with the situation, and asked a mental health counselor to review the article and give Holman his opinion regarding why Neal would have done this. The counselor informed Holman that his concern was reasonable and suggested that Holman encourage Neal to seek regular therapy.
 - 48. Holman did encourage Neal to seek therapy. Neal was not interested.
- 49. On July 7, 2001, Davis gave Neal an Interim performance review of Needs Improvement. He stated, "As of now I feel that the anger is still their (sic)."
- 50. On July 19, 2001, Neal, through his attorney, grieved this interim evaluation because it was based solely on the claim that Neal still had anger. Neal requested an informal meeting to discuss issues that would help resolve conflicts in the workplace, and to "make for better work performance in the future." The letter stated, "Mr. Neal is open to pursuing any suggested options, including mediation."
- 51. In the meantime, Neal's relationship with Martinez further deteriorated. They exchanged hostile emails. On July 17, 2001, Martinez sent an email to Neal stating in part, "I don't recall a discussion about the wedge pullers or about direct charging traffic for clamps. You have, on several occasions, complained about lack of sleep and that your mind was going 'In all different directions.' Could this be a result of that?" In a second response, he states, "I normally wouldn't even respond to a whiny missive such as this but I feel if you are going to quote me, please do so correctly. I told you that as we work only a few feet away from one another you could be an adult about it and talk directly to me, the e-mail was pretty chicken. Then is when you started to whine and I cut you off and told you You were the SORRIEST person I have ever known."

- 52. Neal completed the ten anger management classes by August 8, 2001.
- 53. On August 23, 2001, Davis gave Neal an Interim performance review of Good. He noted "Fred attended all ten anger management classes. Fred still is having trouble managing his time. Still wonders around a lot." Neal responded that he was looking for someone out of the office to discuss something related to work, not wandering around.
- 54. On a date unknown in 2001, Neal's supervisors directed him to attend "mediation" with an individual who turned out to be a therapist. It was the same therapist Holman had conferred with concerning Neal's article on employee suicide. Neal discussed his employment issues with the therapist. He felt that he had been manipulated by CDOT managers into attending therapy, when he anticipated a mediation session.

November 2001 Interim Needs Improvement Rating

- 55. On November 7, 2001, Davis gave Neal an Interim Evaluation of Needs Improvement in all areas. Among his comments were the following: "Fred is still late for work, periodically;" "Fred is still wandering around visiting with people. (Complaining about the job or Supervisor);" "Fred refuses to take orders, consistently questions authority and directions, given him by Supervisor;" "Does not communicate well or effectively, talks around things and he says, it don't matter what he says or thinks it will not be right anyway"; "We have tried to cooperate in every way to help Fred, resolve his problems/circumstances at work. Every thing that we have done, (Mediation, Anger Management, etc.) he says hasn't helped. He does not take a positive approach in getting along with co-workers or supervisors. Constantly complains about work related issues and/or blames others for things that happen to him."
- 56. Davis also attached a separate sheet detailing Neal's performance problems. It noted that vendors had informed Davis Neal had complained to them about being dissatisfied with some aspects of his job.
 - 57. Neal attached a statement denying most of Davis' comments.

November 2001 Mediation

- 58. On August 8, 2001, Neal requested mediation through his attorney. The letter noted Neal's personality conflicts with Martinez and Davis, and stated that Neal sought to discuss issues in the workplace and to resolve them.
- 59. On November 28, 2001, Davis, Martinez and Neal participated in mediation. David Guy facilitated. Guy stated at the outset that while mediation was normally confidential, Davis had requested a written report. All present agreed to those terms.
 - 60. Guy wrote a two-page report. He gave Davis the entire report, and gave Neal page one only.

This disparate treatment demonstrated bias and favoritism on Guy's part that is inappropriate for a mediator.1

- 61. Guy's conclusions were extremely positive concerning Davis and Martinez and quite pessimistic concerning Neal. He noted on page 2, "Care should be taken with this lead worker [Neal] as indicators of potential acting out were reported. Encouragement to seek self-referred counseling might help the individual address the interpersonal and personal issues that he presents."
- 62. Guy informed Holman verbally that Neal may have the potential to be violent and that they should watch him carefully. Guy also suggested that Holman encourage Neal to seek self-referred counseling, which Holman did. Neal was not interested.

"It's a Good Day to Die" Statement

- 63. On January 31, 2002, Neal told a mechanic at the Alamosa shop, "It's a good day to die." The mechanic was concerned and informed Holman about it.
- 64. Holman went directly to the storeroom to ask Neal about it. Neal responded that he didn't mean anything by the statement and that it's an old Indian saying.
 - 65. Neal later confronted the mechanic about having informed Holman of his statement.

March 7, 2002 Refusal to Move Office; Corrective Action

- 66. Ken Martinez' desk had historically been located in the front of the storeroom area. Customers arriving to order items often stopped to talk to Martinez, prior to getting down to business. Dale Davis decided to have Martinez and Neal trade desk locations
- 67. On March 7, 2002, Davis requested that Neal and Martinez trade offices. Davis explained to Neal that he sought to do this to cut down on customer interruptions of Martinez, and to improve the efficiency of storeroom operations. Customers arriving could immediately verify what they needed with Neal on arrival.
- 68. Neal did not trust Davis' motives and refused to move his office. Davis tried to explain the business reasons for his request.
 - 69. Neal refused to follow the order. Davis repeated the order. Neal refused to comply.
- 70. Davis was forced to go to Holman to intervene and order Neal to move his office. He finally did so.
 - 71. On April 12, 2002, Holman imposed a Corrective Action on Neal for insubordination in

¹ Guy had previously been disciplined by the Licensed Professional Counselors Examiners Board for a breach of confidential client/therapist communications and professional standards of practice in January 2000.

refusing to follow Davis' order to move his office. Neal grieved it and lost. He never appealed the final grievance decision to the State Personnel Board.

Neal Concerns Regarding Procurement Rule Variations

- 72. In early March 2002, Neal became aware that an invoice for payment due an oil company had not been paid. Martinez or Davis had submitted the invoice to Accounts Payable with Mortenson Oil crossed out and Siegel Oil written in, by hand. This practice violated CDOT invoicing standards and it was rejected for payment by Accounts Payable.
 - 73. The invoice was later re-submitted appropriately and CDOT paid Siegel Oil the amount due.
- 74. Neal took great offense at this violation of standard policy, and on March 6, 2002, wrote an email to Davis accusing him, Martinez, and another employee of "conspiring" to send out the handwritten invoice "over my advice and objection."
- 75. In April 2002, Martinez received an emergency telephone call from a CDOT employee requesting authority to purchase fencing for an area where livestock were at risk of straying onto the highway. Public safety of those traveling on this portion of highway was at issue.
- 76. Martinez approved the local purchase from a vendor near the site. At the time, he was unaware that a different company had a mandatory state contract to provide the fencing, which would customarily be distributed through the Alamosa central storeroom. Martinez' order was therefore a violation of the mandatory contract.
 - 77. The transaction was later approved by CDOT managers as an emergency measure.
- 78. Neal was extremely concerned about this violation of the mandatory state contract, and spent a lot of time and energy discussing the issue with those up the chain of command.

March 8, 2002 Visit by Reynolds

- 79. On March 8, 2002, appointing authority Reynolds visited the Alameda office. He made a point of requesting to speak to Neal briefly. He and Neal met informally. Reynolds informed Neal he had received complaints about Neal making negative comments about CDOT. He requested that Neal address issues with CDOT internally. He directed Neal not to discuss work-related issues with vendors.
- 80. Reynolds also discussed Neal's continued late arrivals to work, and asked Neal where he lived. Neal indicated he lived 5 or 10 minutes away, and said he would try to do better.
 - 81. Reynolds was informal and non-confrontational in this meeting.

March 12, 2002 Holman Memo

- 82. In March 2002, Holman determined that in accordance with his CDOT Workplace Violence training, he should report Neal's escalating behavior to the Alamosa HR Director, Alice Baker.
- 83. On March 12, 2002, Holman wrote a memo to Baker entitled, "Behavior/Concerns," outlining Neal's recent behaviors he felt were "violence indicators" identified in CDOT's Workplace Violence training.
 - 84. The memo outlined eighteen separate incidents or issues, including the following:
 - A. Throughout his employment Neal had had trouble arriving at work on time; he would improve for periods but repeatedly reverted to being late;
 - B. Neal deleted and/or added items to the storeroom inventory without supervisory approval. In Holman's opinion, Neal ignored direction and went around his supervisor frequently to accomplish his own objectives. Holman did not feel Neal could not be trusted to follow direction. On this basis, Holman had denied Neal signatory approval authority over storeroom matters;
 - C. On May 17, 2001, Neal had lost his temper, resulting in a Corrective Action for violation of the Workplace Violence policy;
 - D. Following his attendance at anger management classes, Neal informed Holman that the classes had not been helpful;
 - E. Neal had kept an article regarding an employee suicide on his office wall and on May 24, 2001, had shown it to Davis; Holman had shown it to a mental health counselor, who informed Holman that his concern was reasonable and suggested that Holman encourage Neal to seek regular therapy. Holman did, but Neal was not interested;
 - F. After mediation in November 2001, the mediator informed Holman verbally that Neal may have the potential to be violent and that they should watch him carefully. The mediator also suggested that Holman encourage Neal to seek self-referred counseling, which Holman did. Again, Neal was not interested;
 - G. On a "recent date" unknown, "one of our traffic employees states that he observed Fred walk into the storeroom and scream, then walk back into his office;"
 - H. On January 31, 2002, Neal told a mechanic at the Alamosa shop, "It's a good day to die." Holman asked Neal about the statement. Neal said he didn't mean anything by the statement and that it's an old Indian saying. Neal later confronted the mechanic about having informed Holman of his statement;

- I. In February 2002, Neal began to carry a new fanny pack at work containing a tape recorder. Neal had indicated to co-workers he tapes his conversations with others at work;
- J. On March 6, 2002, Neal had sent an email to his supervisor, Dale Davis, accusing Davis and Martinez of "conspiring" to make payment to a vendor over Neal's "advice and objection;"
- K. On March 8, 2002, Neal had refused a directive by Davis, his supervisor, to move into another office. He then filed a grievance on the issue.
- 85. Holman concluded his memo by stating, "I don't know if Fred poses a threat to himself or any of us but given what we've been taught in our Workplace Violence training I believe Fred has displayed a number of the violence indicators. While I do not wish to bring upon Fred any additional stress or pain, I don't feel comfortable letting this go on."

CDOT Workplace Violence Policy

- 86. In 1998, in Greeley, Colorado, a CDOT employee named Scott Helfer was given a notice of an R-6-10 pre-disciplinary meeting. When he arrived at the meeting, he pulled out a gun and shot and killed his supervisor, then shot and injured another CDOT employee present in the room.
- 87. Frank Holman and Fred Neal had both worked closely with Helfer in Greeley and knew him well. The incident shocked and traumatized them.
- 88. In the wake of the Helfer tragedy, CDOT instituted a strong workplace violence policy that emphasizes prevention. CDOT mandates workplace violence training on an annual basis for all employees. One of the central components of this training is to educate employees about the early signs and symptoms of an individual who may be a future perpetrator of workplace violence.
- 89. CDOT's Workplace Violence Policy Directive 10.0 states, "Because achieving the goal of preventing workplace violence requires the combined efforts of all employees, employees are expected to adhere to the keys of prevention:
 - 1) understand what violence is;
 - 2) understand themselves, including their attitudes, motivations and decision-making styles so they will not resort to violence;
 - 3) report any persons who may have committed a threat or violent act;
 - 4) supervisors receiving reports of threats or violent acts are expected to respond appropriately;
 - 5) maliciously false reports of threats or violent acts will not be tolerated.

"All employees will receive training concerning their roles and responsibilities in maintaining a nonviolent workplace."

- 90. CDOT's Workplace Violence Procedural Directive 10.1 establishes the means by which an appointing authority can convene a threat assessment of any CDOT employee.
- 91. Policy Directive 10.0 defines workplace violence as "conduct in the workplace against employees, employers, or outsiders . . . involving:
 - Physical acts against persons or their property, or against CDOT property;
 - Veiled or direct verbal threats, profanity or vicious statements that are meant to harm and/or create a hostile environment:
 - Written threats, profanity, vicious cartoons or notes, or other written conduct that is meant to threaten or create a hostile environment; or;
 - Any other acts that are threatening or intended to injure or convey hostility."
- 92. The policy mandates, "any employee who commits an act of violence at work will be subject to corrective and/or disciplinary action including termination of employment and, where appropriate, shall be referred for prosecution by legal authorities."

Threat Assessment of Neal

- 93. Holman and appointing authority Reynolds determined that Neal's conduct on the job necessitated a threat assessment by a member of CDOT's threat assessment team. Neal agreed to participate.
- 94. On March 19, 2002, Neal met with Dr. Doris Gunderson, a member of the CDOT Threat Assessment team. Dr. Gunderson advised Neal of the purpose of the assessment, and that she would be providing his employer with a written report of her findings and recommendations. Neal signed a written consent form to proceed.
- 95. Neal reported the following to Dr. Gunderson: the September 11, 2001 attacks had a very profound emotional impact on him and he continues to experience grief related to this event and ongoing terrorist threats; his father had died on September 13, 2001, two days later; he had lost both grandparents while attending college and he had never really gotten over that loss; and the most pressing issue was a pending criminal charge for assault, and the fact that all co-workers at CDOT were aware of the pendency of that action.
- 96. Neal reported being involved with Habitat for Humanity, having coached girls' soccer since 1987, belonging to church, attending live music events regularly, and being a Native American history buff.
- 97. Neal reported that at work he felt exceedingly self-conscious, "even paranoid," due to his concerns about job jeopardy and how other employees perceive him. He reported that his attorney had advised him it was likely his employer was building a case to terminate him.

- 98. In her March 25, 2002 report, Dr. Gunderson opined the following:
 - "At this time, in my professional opinion Mr. Neal is not an imminent risk for perpetrating violence in the workplace. In this evaluation, his disdain for violence was expressed with convincing emotionality. He subscribes to a native American spirituality that would be incongruent with perpetrating violent acts."
 - "While Mr. Neal denied symptoms of a depressive or anxiety disorder, his presentation was consistent with a high level of distress. The possibility of a psychiatric condition should be appreciated. It is my opinion that without some supportive intervention and assistance (i.e. individual counseling, possibly psychotropic medication) Mr. Neal's mental state is not likely to improve and the potential for further deterioration in work performance is high. Unfortunately, Mr. Neal currently externalizes much responsibility for his current difficulties at work. For this reason, the motivation to participate in therapy will likely be limited."

99. The report recommended the following:

- A. That Mr. Neal return to work the following Monday, to give him time to "follow-up with my strong encouragement to seek the services of an individual therapist. I advised Mr. Neal that he would benefit from interpersonal skills training, a supportive relationship to process unresolved grief and importantly, to manage the stress related to his legal difficulties. I would also recommend that if interpersonal skill building workshops were available through CSEAP that Fred Neal is encouraged to attend."
- B. "Mr. Neal's estrangement from his supervisor and other employees in the work place is a contributing factor to his current distress and mistrust. I would support some level of mediation to review expectations and explore avenues for minimizing the conflicts among these parties."
- C. Noting that Neal had already been instructed in anger management and educated about the zero tolerance policy for workplace violence, Dr. Gunderson determined that further instruction was not necessary. She stated, "I strongly recommend that the policy be enforced vigorously and that future infractions be addressed with immediacy."
- D. "I would recommend that CDOT proceed with progressive discipline in the event Mr. Neal continues to engage in insubordination and/or violates workplace policies."
- 100. Neal requested a copy of the threat assessment report. CDOT's Workplace Violence Policy and Procedural Directives are silent on the issue as to whether employees participating in threat assessments have a right to receive a copy of the resulting report. Respondent refused to provide Dr. Gunderson's report to Neal, fearing possible retaliation by Neal.2

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² Complainant contends that Respondent violated a separate agency policy in refusing to provide Neal with a copy of the threat assessment. However, the policy relied upon is not in the record; rather, it was attached to Complainant's written Closing Argument. Without a stipulation by the parties and an order by the ALJ, this policy

April 2002 Corrective Action

101. On April 26, 2002, Holman imposed a fourth Corrective Action on Neal for failing to report to work on time. Holman noted that Neal had been late to work on ten different occasions in a tenmonth period, despite continuing efforts to address the problem with Neal.

April 2002 Needs Improvement Annual Evaluation

102. On April 20, 2002, Davis gave Neal his annual performance evaluation. Holman signed it as Reviewer. It was a Needs Improvement rating.

Neal's Negative Comments about CDOT to Vendor

103. On June 17, 2002, an employee of a local vendor doing business with the storeroom complained about statements Neal had made to him. Neal had stated that everyone at CDOT was giving him a bad time, that everyone was given his work, that Neal had a lawsuit pending against CDOT, and that a friend in Denver would help him in the lawsuit. The vendor employee felt that Neal's comments were inappropriate and unprofessional.

104. In late June, Director Reynolds, who had specifically directed Neal to refrain from disparaging CDOT to vendors, sent Neal a notice of a pre-disciplinary meeting regarding the vendor complaint.

June 27, 2002 Statements Concerning Helfer

105. On June 27, 2002, after receiving the letter from Reynolds, Neal was in the parking lot preparing to leave work for the day. He saw a co-worker, and asked him if he knew what an R-6-10 meeting was. The employee responded that had had not been to one and did not know. Neal stated he was worried about getting fired. The employee tried to calm Neal by stating it was just a meeting he had to face and to try not to worry.

106. Neal responded, "I wonder if this was the same kind of thing they did to Helfer as is happening to me?" The employee asked who Helfer was. Neal stated, "He is the guy in Greeley that shot my friend and Karen." The employee stated to Neal, "That is not an option." Neal stated, "I know." The employee said, "why not just retire." Neal replied, "Because I am not 65." He then left.

107. The employee reported Neal's statements to supervisors at CDOT. When Holman learned of this conversation, he made contact with the employee, who was opposed to writing a statement, stating that he did not want to get shot. Holman ordered him to write the statement, and he did.

- 108. When Holman said to this employee to let him know if Neal confronted him about his statement, he said, "Sure, I'll be the first one to get shot!"
- 109. Holman believed that this employee feared retribution by Neal. He understood that the employee felt bad about breaking what he considered to be a confidence.

July 16, 2002 R-6-10 Pre-disciplinary Meeting

- 110. On July 16, 2002, the R-6-10 meeting occurred. Neal attended with his attorney. Reynolds attended with HR Director Baker. Reynolds discussed the vendor complaint with Neal, reminding him that in March he had directed him not to make such complaints. Neal made little eye contact with Reynolds during the meeting; Reynolds found it difficult to get an accurate reading of Neal's attitude. Reynolds felt he was not getting through to Neal.
- 111. Neal raised the issue of the fence posts having been ordered despite the mandatory state award to another vendor. Reynolds was unfamiliar with this issue and committed to look into it. Following the meeting, he did so and learned that the transaction had been approved. The fence post order had no bearing on Reynolds' decision to take disciplinary action against Neal.
- 112. Neal also stated that Dale Davis and others at CDOT were out to get him fired. Reynolds asked for specifics, but Neal did not provide evidence or specifics for Reynolds to consider.
- 113. Reynolds then raised the issue of Neal's comments about Helfer. Neal's attorney objected because no notice that these statements would be discussed at the meeting had been provided.
 - 114. Reynolds agreed to re-schedule the meeting to discuss his statements about Helfer.
- 115. Reynolds sent the requisite notice of R-6-10 meeting concerning Neal's comments about Helfer.
- 116. Following the first R-6-10 meeting, Reynolds asked Holman to document the issues leading to his request for discipline against Neal. On July 18, 2002, Holman wrote a memo to Reynolds outlining Neal's history of performance problems, corrective actions issued, and performance ratings. He emphasized that despite repeated warnings and numerous Needs Improvement evaluations, Neal had not changed his behavior. Holman outlined in detail the incident on June 27 wherein Neal compared himself to Helfer.

July 25, 2002 R-6-10 Pre-disciplinary Meeting

117. Prior to the July 25, 2002 pre-disciplinary meeting, Reynolds reviewed Neal's entire personnel file. He was extremely concerned about Neal's statements about Helfer, and wanted to have all pertinent information about Neal's performance history available to him prior to this meeting. He reviewed both of Holman's memos, and learned that Neal had attended anger management classes. He spoke with Baker and Holman; he reviewed all personnel rules pertaining

to disciplinary action.

- 118. On July 25, 2002, Neal, his attorney, Reynolds, and Baker attended the second R-6-10 meeting. Reynolds asked Neal why he had made those statements about Helfer. Neal did not deny having made the statements. He was unable to explain why he had made them. He said that he wondered if Helfer had experienced some of the pressures that he was experiencing. He said he was trying to express what he felt.
- 119. Reynolds was extremely concerned about Neal. To compare himself to Helfer in the predisciplinary context was extraordinarily troubling. Reynolds believed that Neal's statements about Helfer served only to make others upset and scared at CDOT. In Reynolds' mind, the statement constituted a veiled threat, in violation of the workplace violence policy.
- 120. Reynolds attempted at this meeting to secure a commitment from Neal to improve his performance, to really dedicate himself to CDOT. Reynolds felt that Neal was unable or unwilling to make this commitment to him. Neal again found it difficult to make eye contact with Reynolds. Reynolds felt he was unable to establish a real connection with Neal, to obtain "buy in" from Neal.
- 121. In most pre-disciplinary situations, Reynolds is able to secure this commitment from employees. He then gives them the opportunity to return to work and improve. He felt that returning Neal in the absence of this commitment would be a futile waste of CDOT resources.
- 122. Reynolds determined that he had no choice but to terminate Neal. The July 29, 2002 termination letter details Neal's history of corrective actions and Needs Improvement ratings, none of which had resulted in a change in his behavior at work. The letter also focuses in large part on his statements about Helfer made to his co-worker and at the July 25 R-6-10 meeting. He noted that at the meeting, Neal stated, "I am not sure why I made the comment other than I am just feeling pressured too and I feel that Scott [Helfer] was probably pressured to some extent there at the end. He had to be under some tremendous pressure to have done this. I don't know what all demons were in him to do this." When Reynolds asked what his motive was in making this statement, he responded that it was not intended to do violence to anyone, that he was just curious if he had experienced some of the pressures that Helfer had. Neal further stated that he was just trying to understand if extreme pressure can cause someone to do this or what is the reason this happened.
- 123. Reynolds concluded that Neal's comments about Helfer were "reasonably calculated to make this person feel uneasy and to put him in a position to be worried about your possible future actions." He further concluded that the statement was "extremely inappropriate and constitutes a veiled threat," in violation of Policy Directive 10.0. At the end of the letter, Reynolds stated that he was "gravely concerned over your ability to safely work at CDOT."

DISCUSSION

I. BURDEN OF PROOF

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. COMPLAINANT COMMITTED THE ACTS FOR WHICH HE WAS DISCIPLINED

Neal committed the acts upon which discipline was based, as the Findings of Fact above demonstrate. While Neal dedicated much of his defense to impugning the motives of Holman, Davis, and Martinez, he did not deny many of the core facts of Respondent's case, including the following:

- On May 17, 2001, he became upset with Martinez and Watson and cursed at them in a raised voice;
- Neal kept an article describing a company employee committing suicide on his office wall and on May 24, 2001 gave a copy of it to Dale Davis, his direct supervisor; when confronted about it by Holman, he was unable to explain his actions;
- On January 31, 2002, Neal told a mechanic in the shop, "It's a good day to die";
- Holman repeatedly encouraged Neal to seek therapy to address his personal issues, but Neal refused to take action to improve his emotional wellbeing;
- On March 25, 2002, after having a detailed discussion of the grief Neal was experiencing, Dr. Gunderson strongly recommended to Neal that he seek therapy; he never did so;
- Despite Reynolds' directive to stop disparaging CDOT to outside vendors, he continued to do so;
- Despite repeated corrective actions and directives to open the storeroom at 8:00 a.m., Neal continued to arrive to work late;
- On June 27, 2002, upon receipt of the letter noticing the R-6-10 meeting, he informed another CDOT employee that he wondered if the same kind of thing they did to Helfer was happening to him. When the co-worker asked who Helfer was, he stated he was the employee in Greeley that had shot his friend and another employee.

Neal's comments about Helfer were a veiled threat constituting an extremely serious violation of CDOT Policy Directive 10.0. Even if Neal had no conscious intent to be threatening to others, the remark constituted one of the most frightening statements a CDOT employee could make. The only possible effect Neal's statements could have had on others at CDOT would be to put them on notice that Neal might "blow" at any moment. Neal's failure to appreciate the traumatizing effect of his statements on others is also extremely troubling. When viewed in the context of his previous statement, "It's a good day to die," and his conduct with the article about an employee committing suicide, Neal's reference to Helfer constituted a dire threat.

III. RESPONDENT'S ACTIONS WERE NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO RULE OR LAW

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

Reynolds Performed a Thorough Investigation

Reynolds reviewed Neal's entire personnel file, the memos from Holman, the threat assessment, and all applicable Board rules, prior to meeting with Neal. He spoke with Holman and Alice Baker, Alamosa HR Director. He used the utmost diligence and care to obtain and review all pertinent evidence prior to making his decision. In addition, at the R-6-10 meeting, he engaged Neal at length on the issue of his statements about Helfer. He gave Neal multiple opportunities to explain why he made the statements, to convince Reynolds that the statements should not be construed as a veiled threat and a warning sign of potential violence in the future. Lastly, Reynolds considered and followed up on all mitigating information Neal provided.

Neal Imposed Too Great a Threat to Remain in his Position

Dr. Gunderson was clear in her threat assessment report: "I strongly recommend that the [workplace violence] policy be enforced vigorously and that future infractions be addressed with immediacy," and, "I would recommend that CDOT proceed with progressive discipline in the event Mr. Neal continues to engage in insubordination and/or violates workplace policies."

Following the issuance of that threat assessment report on March 25, 2002, Neal engaged in repeated acts of insubordination and made a veiled threat of the most serious sort in violation of the workplace violence policy. He violated a direct order of Reynolds to cease his disparaging remarks about CDOT to outside vendors; he continued to arrive at work late despite years of corrective

action on the issue; and, he compared himself to a co-worker who had murdered his supervisor and shot another co-worker in a pre-disciplinary meeting.

In addition, prior to the threat assessment, Neal had stated, "It is a good day to die," to a coworker, had displayed an article about an employee suicide on his office wall, and had shown a copy of this article to his direct supervisor.

Neal posed far too great a threat for Reynolds to do anything but separate him from employment. Reynolds made the only reasonable decision available to him, based on the facts before him

Neal argues that the threat assessment demonstrated a complete disregard for his right to privacy, and was not warranted by the facts. These contentions have no weight. State agencies have an affirmative duty to assess potential workplace threats early, before an employee escalates to aggressive or violent behavior. Holman appropriately responded to the information before him, in compliance with Policy Directive 10.0, by issuing the memo to Baker listing the early signs of potential workplace violence. Moreover, Neal's history of unacceptable behavior fully justified the threat assessment.

Neal's Refusal to Respect Authority Contributed to His Termination

Neal argues that the decision to place him in a position of authority over Ken Martinez created a source of friction that resulted in Martinez harassing him on a routine basis. He further argues that the May 17, 2001 workplace violence incident was provoked in part by Martinez. Both of these contentions proved to be true at hearing. However, they do not provide the entire picture.

Neal fails to account for his own pattern of refusing to take direction from supervisors. If Neal had accepted Holman's and Davis' direction, the evidence demonstrates that Holman would have given Neal authority commensurate with his position, including signature authority over storeroom inventory. The source of conflict between him and Martinez would then have been resolved. Holman had hired Neal in 1995, and liked him. Neal's persistent refusal to follow Holman's reasonable directives (to open the storeroom on time; to run decisions on storeroom inventory by him prior to taking action) resulted in his loss of Holman's trust in Alamosa. Unfortunately, he never earned it back.

Neal also argues that his strict adherence to procurement rules and procedures clashed with the Alamosa shop's laissez-faire attitude towards purchasing and procurement, especially from local vendors. He avers that this attitude became a catalyst for Respondent's drive to remove Neal from his position. Neal failed to prove this at hearing. Neal's position on procurement rules was not a major issue for Holman or Davis. Further, Reynolds was unaware of the conflicts Neal had with Alamosa managers concerning purchasing and procurement procedures until the pre-disciplinary meeting in early July. This issue had no bearing on his decision to impose discipline.

Neal requested an award of attorney fees and costs. Because he has not prevailed on his

appeal, he is not entitled to such an award. Section 24-50-125.5, C.R.S.

CONCLUSIONS OF LAW

- 1. Complainant committed the acts upon which the discipline was based;
- 2. Respondent's action was not arbitrary, capricious, and contrary to rule or law;
- 3. Complainant is not entitled to an award of attorney fees and costs.

ORDER

Respondent's action is <u>affirmed</u>. Complainant's appeal is <u>dismissed with prejudice</u>.

DATED this ____day of July, 2004, at Denver, Colorado.

Mary S. McClatchey Administrative Law Judge 1120 Lincoln St., Suite 1420 Denver, CO 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the _____ day of July, 2004, I placed true copies of the foregoing INITIAL DECISION AND NOTICE OF APPEAL RIGHTS in the United States mail, postage prepaid, addressed as follows:

N. Nora Nye Colorado Federation of Public Employees 1580 Logan Street, Suite 310 Denver, Colorado 80203

And in the interagency mail to:

Valerie Arnold Assistant Attorney General Employment Section 1525 Sherman Street, 5th Floor Denver, Colorado 80203

Andrea C. Woods		